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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. (1)

In The

SUPREME COURT OF THE UNITED STATES

In Re: John Gardner Black
Pro Se Petitioner

PETITION FOR EXTRAORDINARY WRIT PURSUANT TO 28 USC § 1651(A) WRIT OF MANDAMUS

John Gardner Black, *Pro Se*
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814-632-8631

INTRODUCTION

On December 28, 2006, Petitioner submitted an appeal to the Third Circuit Court of Appeals. Petitioner's motion, denied by the District Court, was to have his indictment set aside based upon newly discovered evidence, as detailed below. Petitioner had completed his term of incarceration and supervised release when the District Court revealed that it had conducted litigation without the presence of Petitioner or his attorney. On June 20, 2007, the Third Circuit denied a certificate of appealability to Petitioner, who was not incarcerated, and did not rule on either the appeal or Petitioner's unopposed motion for summary judgment.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit Court of Appeals commit plain error when it: (a) construed Petitioner's appeals as a request for a certificate of appealability under 28 USC §2253(c)(1) when Petitioner was not in federal custody and did not seek relief under habeas corpus, and (b) then denied the issuance of that certificate of appealability?

2. Did the Third Circuit Court of Appeals commit plain error when it, (a) construed Petitioner's appeals as a proceeding under 28 USC § 2255, (b) required the issuance of a certificate of appealability pursuant to 28 USC § 2253(c)(1), and then (c) denied the certificate, thereby preventing that court from ruling on Petitioner's unopposed motion for summary judgment?

3. Did the Third Circuit commit plain and fundamental error when it entered an order denying an appeal from a District Court's order that was not appealed and for holding that Petitioner's indictment was "previously litigated" when both the government and Petitioner have admitted otherwise and the established record shows that both parties contemplated further litigation?

LIST OF PARTIES

1.) John Gardner Black, *Pro Se*
Petitioner

2.) Dolores Korman Sloviter,
Circuit Judge of the Third Circuit
3.) Anthony Joseph Scirica,
Circuit Judge of the Third Circuit
4.) Theodore Alexander McKee,
Circuit Judge of the Third Circuit
5.) Marjorie O. Rendell,
Circuit Judge of the Third Circuit
6.) Maryanne Trump Barry,
Circuit Judge of the Third Circuit
7.) Thomas L. Ambro,
Circuit Judge of the Third Circuit
8.) Julio M. Fuentes,
Circuit Judge of the Third Circuit
9.) David Brooks Smith,
Circuit Judge of the Third Circuit
10.) D. Michael Fisher,
Circuit Judge of the Third Circuit
11.) Michael A. Chargares,
Circuit Judge of the Third Circuit
12.) Kent A. Jordan,
Circuit Judge of the Third Circuit
13.) Thomas M. Hardiman,
Circuit Judge of the Third Circuit

Respondents

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2.	June 20, 2007 Order from the Third Circuit
5.	August 16, 2007 Denial for Rehearing

Table of Cited Authorities

The United States Code

Page	Citation
7.	28 USC § 455(a)(1)
7.	28 USC § 455(b)(1)
6.	28 U.S.C. § 1651
6.	28 U.S.C. § 2253(c)(1)
11.	28 U.S.C. § 2255

The United States Code of Federal Regulations

Page	Citation
7.	26 CFR § 1.148-5(d)(1)(i)
7.	26 CFR § 1.148-5 et seq.

Case Law

Page	Citation
9.	*Bald Eagle School District vs Keystone Financial*, 189 F.3d 321 (3rd Cir 1999)
8.	*SEC v Howey*, 328 U.S. 293 (1946)

Basis for this Court's Jurisdiction

This Court has the jurisdiction in this matter to correct plain errors of the lower court which have resulted in manifest injustice under 28 USC § 1651, The All Writs Act.

The orders erroneously entered by the Third Circuit Court of Appeals ("Third Circuit") were entered on June 20, 2007. Petitioner's Sur Petition for *En Banc* Rehearing was also erroneously denied on August 16, 2007.

A writ of supervisory control is the appropriate procedure in these circumstances. Such a writ may be issued "to correct erroneous rulings made by a lower court, where no appeal is available or the remedy by appeal cannot afford adequate relief and gross injustice is threatened as a result of such rulings," according to Black's Law Dictionary.

Petitioner has no effective remedy for appeal under current law. Pursuant to 28 USC § 2253(c)(1) an appeal may only be taken to the court of appeals. It was the Third Circuit that construed Petitioner's notice of appeal as a request for a certificate of appealability which it then denied and then *en banc* denied Petitioner a rehearing.

Statement of the Facts

Petitioner was indicted by a grand jury for falsely representing the value of a security ("CIA") as being equal to the remaining liabilities of Petitioner's company to the owners of the CIA, municipalities which had invested the proceeds of tax exempt bonds. 26 CFR § 1.148-5(d)(1)(i) specifically authorizes the accounting practices Petitioner followed in valuing the CIAs. Petitioner was not indicted for ever having "offered, purchased or sold" the CIA at other than market value.

On January 24, 2000, Petitioner stated in district court that he did not plead guilty to misrepresentation of the market value of the CIA. The government then moved the district court to amend Petitioner's indictment, because the market value "is not a point agreed upon." In keeping with the government's motion at bar, the district court then amended Petitioner's indictment removing the charge of misrepresentation of market value. Petitioner was charged with Fraud by an Investment Advisor despite there being no fraud in any transaction in the CIA, as stipulated by the government in the Joint Stipulation of Facts. The district court, on April 14, 2000, sentenced Petitioner to 41 months of incarceration for, 36 months of supervised release and restitution in the amount of $61 million.

On June 13, 2003, Petitioner was released from federal custody, and on June 13, 2006 he completed his 36 months of supervisory release.

Subsequently, his Order of Restitution was marked satisfied in July 2006.

On December 13, 2005, the district court stated that it had held litigation on the market value of the CIA and had resolved their value without the participation of Petitioner or his attorney. The value litigated was not divulged to Petitioner or his attorney prior to sentencing even though the court had personal knowledge of the disputed fact. Federal regulations require the value of the CIA to be exactly as Petitioner had represented to his customers, $233 million [26 CFR § 1.148-5 et seq.].

On October 24, 2006, Petitioner submitted a motion to the district court requesting recusal of Judge Donetta Ambrose pursuant to 28 USC § 455(a)(1) and § 455(b)(1) for her admitted personal knowledge of disputed evidentiary facts during the proceedings of January 24 and April 14, 2000. The district court knew that the market value of the CIA was set by federal regulation at $233 million, the value Petitioner had represented to his customers. On November 2, 2006 the Third Circuit intervened in the proceedings and notified the district court that it construed Petitioner's motion for recusal as a notice of appeal, effective October 24, 2006. On October 31, 2006, Judge Ambrose denied Petitioner's Motion for Recusal without opinion.

On December 13, 2006, Petitioner submitted a motion to the district court.to set aside his indictment because: (1) neither Petitioner nor his attorney were involved in the litigation concerning the market value of the CIA; (2) federal regulations

set the market value of the CIA at the value Petitioner was indicted upon; (3) the fair market value was in excess of the regulated value by approximately 15%; (4) the US Attorney's office did not deny that it had not presented the fair market value of the CIA to the grand jury despite having obtained an indictment alleging misrepresentation; and, (5) the district court knew the regulated and fair market value of the CIA on January 20, 2000 when it sentenced Petitioner. The district court, again without an opinion, denied Petitioner's motion. A notice of appeal was filed by Petitioner on December 28, 2006 and incorporated by the Third Circuit into the existing appeal of October 24, 2006.

On February 7, 2007, Petitioner submitted his "Defendant's Brief" before the February 16, 2007 deadline. The government did not submit a reply brief. On March 6, 2007, Petitioner submitted his Motion "to immediately set aside his indictment based upon the record established at the district court." The elements contained in the motion were: (1) the value of the securities was determined pursuant to federal regulations; (2) Petitioner did not plead guilty to misrepresentation of the CIA's market value; (3) the fair market value of the CIA was approximately 15% higher than the federally regulated market value; and, (4) Petitioner's indictment was amended by the district court denying Petitioner his due process rights. The government again did not dispute the facts in Petitioner's motion and did not submit a reply brief.

On April 16, 2007, the Securities Exchange Commission filed a brief in the Third Circuit stating

it had not followed the published regulations of the Internal Revenue Service ("IRS") when it commenced its action in 1997. Those IRS regulations control and prescribe not only the method of reporting but also the method of valuation which must be followed for the investment of the proceeds of tax exempt municipal bonds. The brief reflects also that the Securities and Exchange Commission chose to ignore the established case law [*SEC v Howey*, 328 U.S. 293 (1946)] of this Court for valuing an investment contract. The brief also states that the US Attorney's Office for the Western District of Pennsylvania followed the same procedure as the Securities Exchange Commission in not following IRS regulations.

The Orders of June 20, 2007

The Third Circuit construed its own November 2, 2006 intervention into the district court proceedings seeking judicial recusal as a request for a certificate of appealability despite Petitioner not being incarcerated, and then denied the issuance of the certificate. The Third Circuit held that Petitioner "...disputed that District Court's order, entered in 2005...." To the contrary, Petitioner did not dispute the District Court's 2005 orders. It was in those orders that the District Court stated that it had conducted litigation to determine the market value of the CIAs. The government does not dispute that, pursuant to IRS regulations, the value of the CIA was $233 million on September 26, 1997, the same value Petitioner had represented to his clients. What Petitioner was seeking was the recusal of Judge Ambrose after she admitted to knowledge of

exculpatory evidence when she sat in judgment of Petitioner.

The Third Circuit further stated in the orders that Petitioner's indictment was "previously litigated." As of April 14, 2000, the value had not been litigated between Petitioner and the government, which the government admitted in the District Court transcripts of January 24, 2000. However, the government does admit in the Joint Stipulation of Facts entered into on January 24, 2000, that the CIA was purchased and owned at fair market value by Petitioner's customers.

The Third Circuit held that "Reasonable jurists would not debate whether the district court was correct in denying Appellant's post judgment motion." Those motions were for the district court's recusal because of "personal knowledge of disputed evidentiary facts"; for the district court's failure to uphold published federal regulations; for the district court allowing the US Attorney's office to bring an indictment in which the court knew no evidence of the misrepresentation of the CIA's market value was presented; and, for amending Petitioner's grand jury indictment on January 24, 2000, thereby preventing Petitioner from defending himself.

In a published opinion by the Third Circuit in this case, that court chose to ignore not only the established case law [*SEC v Howey*] precedent in this Court but also in the Third Circuit. In the only opinion of its kind Petitioner can find, the Third Circuit stated that the CIAs "were worth significantly less than their purchase price because

of the shortfall in the collateral in the funds already under management" [*Bald Eagle School District vs Keystone Financial*, 189 F.3d 321 (3rd Cir 1999)]. This opinion by the Third Circuit contradicts this Court's established case law and the governing regulations promulgated by the Internal Revenue Service which require that the value of a security be determined by a reasonable expectation of profits generated through the efforts of others. Finding that a security's fair market value must be equal to the book value of an enterprise perverts not only prior judicial interpretation but also standard financial practices. In this case, the government has stipulated and the district court approved on January 24, 2000, that Petitioner and his companies were distributing over $2 million of profits per month, a 14% annualized return.

Relief Sought

Petitioner requests that this Supreme Court issue its Writ of Supervisory Control to correct the erroneous interpretation of habeas corpus procedure by Respondents. Respondents committed plain error by requiring a person not in federal custody to apply for relief under habeas corpus. This is a unique interpretation of the law and one which leads to a perversion not only of the habeas corpus procedure but also appellate procedure because Petitioner may only apply for relief to the same appeals court that issued the erroneous order.

Petitioner requests that this Court instruct the Third Circuit to rescind its Order of June 20, 2007 in the case of *United States of America v. John Gardner Black*, No. 07-1022. Such invalidation will require the Third Circuit to reach judgment on Petitioner's unopposed "Motion to Set Aside his Indictment Based Upon the Record Established at the District Court".

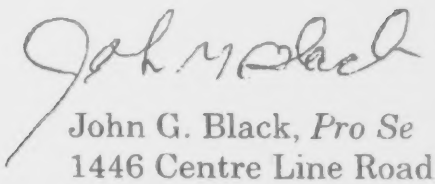
Conclusion

The uncontested facts support Petitioner's request for a Writ of Supervisory Control. The Third Circuit Court of Appeals has erroneously construed a proceeding under Rule 60(b) of the Federal Rules of Civil Procedure as a proceeding under 28 USC § 2255, a Federal Habeas Corpus proceeding.

Petitioner is not in federal custody, having been released on June 13, 2003, and discharged from supervised release on June 13, 2006. The underlying procedure at the district court and at the Third Circuit was not commenced until October 24, 2006, following the district court's disclosure that it had personal knowledge of disputed evidentiary facts it did not disclose during Petitioner's criminal proceeding. Only a "prisoner in federal custody" may bring an appeal under 28 USC §2255, therefore the Third Circuit's opinion results in a procedure which prevents a person who is no longer incarcerated from appealing a criminal conviction, regardless of newly discovered evidence or intervening opinions and laws. This precedential opinion which the Third Circuit has issued is not shared by any other Court of Appeals and requires intervention by this Supreme Court through the issuance of its Writ of Supervisory Control.

December 4, 2007

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this:

PETITION FOR EXTRAORDINARY WRIT PURSUANT TO 28 USC § 1651(A)

WRIT OF SUPERVISORY CONTROL

Were each sent to:

Dolores Korman Sloviter,
Circuit Judge of the Third Circuit
Anthony Joseph Scirica,
Circuit Judge of the Third Circuit
Theodore Alexander McKee,
Circuit Judge of the Third Circuit
Marjorie O. Rendell,
Circuit Judge of the Third Circuit
Maryanne Trump Barry,
Circuit Judge of the Third Circuit
Thomas L. Ambro,
Circuit Judge of the Third Circuit
Julio M. Fuentes,
Circuit Judge of the Third Circuit

David Brooks Smith,
Circuit Judge of the Third Circuit
D. Michael Fisher,
Circuit Judge of the Third Circuit
Michael A. Chargares,
Circuit Judge of the Third Circuit
Kent A. Jordan,
Circuit Judge of the Third Circuit
Thomas M. Hardiman,
Circuit Judge of the Third Circuit

At:

United States Court of Appeals
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Via first class mail, postage prepaid on December 4, 2007.

John G. Black, Pro Se

CERTIFICATE OF COMPLIANCE
WITH WORD COUNT

PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO 28 USC § 1651(A)
WRIT OF SUPERVISORY CONTROL

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of supervisory control contains 1,913 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 4, 2007

John G. Black, Pro Se

APPENDIX

DLD-254 May 31, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **07-1022**

UNITED STATES OF AMERICA

v.

JOHN GARDNER BLACK

(W.D. Pa. Crim. No. 99-cr-00203)
CRIMINAL TREATED AS CIVIL

Present: BARRY, AMBRO and FISHER, Circuit Judges

Submitted are:

(1) By the Clerk for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6;

(2) Appellant's notice of appeal, which may me construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(3) Appellant's motion "to immediately set aside indictment..."

in the above captioned case.

Respectfully,

Clerk

MMW/EAW/zm/pdb

ORDER

Appellant appeals from the District Court order denying the motion to set aside his conviction and restitution order. Appellant's motion alleged prosecutorial misconduct in the procurement of a count in the Indictment and disputed the District Court's order, entered in 2005, that denied his motion to dismiss the indictment as previously litigated. Appellant's motion attacks the underlying sentence or judgment; it thus must be construed

(Continued)

ORDER

as a motion filed under 28 U.S.C. § 2255. Gonzalez v, Crosby, 125 S.Ct. 2641, 2648 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3rd Cir. 2004). A certificate of appealability is required to obtain review of the District Court's order denying the motion.

Appellant's request for a certificate of appealability is denied. Reasonable jurists would not debate whether the District Court was correct in denying Appellant's post-judgment motion. See Miller-El v. Cockrell, 573 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Appellant's first §2255 motion was denied on the merits in 2001; we declined to issue a certificate of appealability in 2002. Thus, Appellant's post-judgment motion, filed in 2006, is a second or successive §2255

motion, for which Appellant did not obtain prior authorization from this Court pursuant to 28 U.S.C. § 2244, and the District Court lacked jurisdiction to consider the motion. See Robinson v. Johnson, 313 F.3d 128, 139-140 (3rd Cir. 2002); see also 28 U.S.C. § 2244(b)(2),(3).

As we have denied the application for a certificate of appealability, we do not reach the question of summary action. Appellant's motion "to immediately set aside indictment based upon record established at District Court" is denied.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: June 20, 2007

PDB/cc: Mr. John Gardner Black
Robert L. Eberhardt, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. **07-1022**

UNITED STATES OF AMERICA

v.

JOHN GARDNER BLACK

(W.D. Pa. Crim. No. 99-cr-00203)
CRIMINAL TREATED AS CIVIL

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHARGES, JORDAN, and HARDIMAN,
Circuit Judges

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is **DENIED**.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: August 16, 2007